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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LAMAR ALEXANDER, *et al.*,

Petitioners,

v.

HERSHEL CHOATE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does section 504 of the Rehabilitation Act of 1973 forbid practices which have the effect of discriminating by reason of handicap?

2. If section 504 forbids only practices which are motivated by an intent to discriminate against handicapped individuals, are the regulations promulgated by 24 federal agencies forbidding practices with a discriminatory effect nonetheless valid as reasonably related to the statute?

3. Did the limitations imposed by Tennessee in 1980 on its Medicaid hospitalization have a discriminatory effect on the handicapped within the meaning of section 504 and the applicable regulations of the Department of Health and Human Services?

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STATEMENT OF THE CASE

This action was commenced in August, 1980, on behalf of a number of individuals receiving medical care under the Tennessee Medicaid program. Respondents challenged several changes in Medicaid which the State then proposed to institute to reduce the scope and thus the cost of that program. (J.A. 12-15) By the spring of 1981 the parties had settled all issues raised by the complaint except the legality of the state's plan to lower from 20 to 14 days the number of days of hospitalization provided annually to Medicaid patients. (Pet. All). Respondents challenged the legality of that reduction on a number of grounds, of which the only one relevant to

this appeal is a claim that the reduction would violate section 504 of the Rehabilitation Act of 1973.

At trial the state conceded, and the district court therefore assumed without discussion, that section 504 applied to practices which have the effect of discriminating against the handicapped. (Pet. App. A40). The trial court rejected respondents' section 504 claim on two distinct grounds. First, it held that, although respondents had demonstrated that the 14 day rule would have had an adverse impact on handicapped Medicaid patients in 1979-80, respondents had failed to show that the patterns of Medicaid use, and thus the impact of the 14 day rule, would necessarily be the same in future years. (Pet. App. A33-A35). Second, the trial court concluded that the type of adverse impact which existed in 1979-80 was not the

kind of discriminatory effect to which section 504 and the relevant regulations applied. (Pet. App. A35-A43).

On appeal the petitioners again conceded that section 504 applied to practices with a discriminatory effect,[1] and the sixth circuit so held. (Pet. App. A7-A10). The court of appeals concluded that respondents had adequately demonstrated that the 14 day rule would adversely affect handicapped Medicaid patients. (Pet. App. A10-A12). The sixth circuit held that the evidence adduced by respondents was sufficient to establish a prima facie case of unlawful discrimination. (Pet. App. A12-A15, A19 n.12). Since Tennessee had inexplicably failed to adduce at trial any evidence to justify or even explain why it had chosen the 14 day

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[1] Brief for Defendants-Appellees, pp. 11-12.

rule, rather than some method less burdensome for the handicapped, to reduce the scope and cost of the Medicaid program, the court of appeals remanded the case with instructions that the state be afforded another opportunity to do so. (Pet. App. A15-A16).

The state sought certiorari to decide a question which it had never put in issue in the lower courts, whether section 504 and the regulations promulgated pursuant to that statute forbid practices with a discriminatory effect. (Pet. ii, 7). In this Court petitioners now apparently concede that the section 504 regulations establish a discriminatory effect rule, and argue that the regulations are invalid. (Pet. Br. 18). Petitioners also sought certiorari to decide whether the 14 day

rule had an adverse impact within the scope of section 504 and the applicable regulations. (Pet. ii).

SUMMARY OF ARGUMENT

A. Whether section 504 applies to practices with a discriminatory effect cannot be resolved by reference to the statutory language. Other prohibitions against "discrimination" have been construed either to cover such effects, or to apply only to practices motivated by a discriminatory purpose, based on their particular legislative histories. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Guardians Association v. Civil Service Commission, 77 L.Ed.2d 866 (1983).

Section 504 was characterized in broad language by its proponents. Senator Cranston, for example, insisted it dealt "comprehensively" with the problem of

discrimination. (119 Cong. Rec. 5862 (1973)). The term "discrimination" was repeatedly used to describe practices which involved only discriminatory effects, such as architectural barriers, the failure to make accommodations necessary to permit participation by the disabled, and discriminatory employment procedures. None of these practices would be subject to section 504, as Congress clearly intended, if the statute were applied only in cases in which there was proof of a discriminatory motive.

Petitioners suggest that section 504, like Title VI, was intended only to incorporate a constitutional standard regarding discrimination. But in 1973 there were no clearly established constitutional rights concerning discrimination against the handicapped, and none are referred to in the debates on section 504. Although the language of section 504

was patterned after Title VI, in 1973 the unchallenged administrative interpretation of Title VI applied it to practices with a discriminatory effect. "[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but what its perception of the law was". Brown v. GSA, 425 U.S. 820, 828 (1976).

Twenty four federal agencies have issued regulations under section 504 which apply it to practices with a discriminatory effect. The section 504 regulations "particularly merit deference" because they were framed in close consultation with Congress. Consolidated Rail Corporation v. Darrone, 79 L.Ed.2d 568, 577 (1984). Several 1978 amendments to the Rehabilitation Act reflect congressional approval of these effect regulations.

B. Even if section 504 itself forbids only practices with a discriminatory purpose, the discriminatory effect regulations are nonetheless valid as reasonably related to the statute. Guardians Association v. Civil Service Commission, 77 L.Ed.2d 866 (1983).

C. The Tennessee Medicaid rules in effect at the time of trial have since been altered. Some individuals who formerly could receive only 14 days of treatment are today eligible for 20 days, while others now get none. Whether the state's present practices have a discriminatory effect, and if so of what type and magnitude, is neither disclosed by the record nor known to the parties. Since plaintiffs seek only injunctive relief, a determination of the legality of the 1980 rules may be inappropriate.

Petitioners have acknowledged that the handicapped population of Medicaid recipients "would suffer proportionally more from the reduction in hospital benefits than the non-handicapped ..." (Pet. App. A11 n.7) Under the 1980 rules 27.4% of handicapped patients were denied needed hospitalization each fiscal year, compared to only 7.8% of nonhandicapped patients. Prior to the 1980 rules, handicapped patients were 33% of these receiving hospitalization under Medicaid, but they were 63.4% of the patients selected to bear the burden of the Medicaid cuts. This type of adverse impact is clearly within the scope of section 504 and the applicable HHS regulations. 45 C.F.R. §§ 84.4(b)(4), 84.52(a)(3).

Tennessee is free to limit the scope of its Medicaid program, and may use any method which does not place the burden of those limitations to a disproportionate

degree on disabled Medicaid patients. Most states control their Medicaid costs by means of practices which have no discriminatory effect. Respondents do not argue that Tennessee should apply to handicapped patients a rule different than that applicable to the nonhandicapped, but ask only that the state adopt a single rule for all which is neutral not only on its face but also in its impact.

The court of appeals did not hold that Tennessee's 14 day rule was unlawful, but concluded only that the undisputed adverse effect established a prima facie case of discrimination under section 504. The sixth circuit directed that on remand the state be afforded an opportunity to justify its selection of the 14 day rule as a method of limiting the Medicaid program. Since Tennessee adduced no evidence at trial to justify or even explain that

choice, its legality cannot be determined on the present record. Neither party sought certiorari to review the legal standards which the sixth circuit announced should be applied on remand to assess any such evidence; the correctness of those standards is therefore not before this Court.

ARGUMENT

I. SECTION 504 PROHIBITS PRACTICES WHICH HAVE THE EFFECT OF DISCRIMINATING AGAINST THE HANDICAPPED

(1) The Statutory Language

Section 504 provides in pertinent part:

> No otherwise qualified individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance....

The term "discrimination", as this Court has repeatedly noted,[2] is susceptible of a variety of interpretations. The "discrimination" forbidden by Title VII has been construed to include practices with a discriminatory effect. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Title VI prohibition against discrimination, on the other hand, has been held to bar only actions motivated by an invidious purpose. Guardians Association v. Civil Service Commission, 77 L.Ed.2d 866 (1978).

The ambiguous phrase "by reason of" in section 504, like the similar language in Title VI and Title VII,[3] could be read to

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2 Guardians Association v. Civil Service Commission, 77 L.Ed.2d 866, 875 (1983).

3 Title VI refers to exclusion "on the grounds of" race, color or national origin. 42 U.S.C. § 2000d. Title VII forbids the denial of employment opportunities "because of" race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2.

refer to the motives of those administering a federally assisted program, or to the fact that an individual's handicap was the cause of his or her exclusion from participation in or the benefits of such a program. "Reason" can be used to indicate motivation ("the reason for the new policy") or causation ("the reason why the bridge fell down"). The use of the term "solely" prior to "by reason of" in section 504 merely emphasizes that the prohibited basis for exclusion or denial of benefits -- be it motivational or causal -- must be handicap.

The differing interpretations of the similarly vague language of Title VI and Title VII were based on the very different legislative histories of those provisions. Bakke relied on repeated and unequivocal congressional declarations in 1964 that the purpose of Title VI was merely to extend to

programs receiving federal assistance the same then well known constitutional requirements already applicable to programs operated by the federal government.[4] By 1964, it was apparent that the Fifth and Fourteenth Amendments forbad public officials from excluding blacks from government programs or from serving them only on a segregated basis. The purpose of Title VI was to extend to federally assisted activities "the existing right to equal treatment" guaranteed by the Fifth and Fourteenth Amendments. 438 U.S. at 330. In Griggs, on the other hand, this Court noted that Title VII had been enacted in part because of congressional concern that the employment opportunities of minorities and women had been limited by

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[4] 438 U.S. at 287 (Powell, J.), 328 (opinion of Justices Brennan, White, Marshall and Blackmun).

artificial and unnecessary job requirements unrelated to actual qualifications. 401 U.S. at 430-31.

Here, as in Bakke and Griggs, little meaning can be gleaned from the language of section 504 itself. Whether section 504 is to be construed to apply to practices which have the effect of discriminating against the handicapped must be determined in light of the particular legislative history of that provision. "It is Congress' intention in 197[3], not in 1964, that is of significance in interpreting" section 504. North Haven Board of Education v. Bell, 456 U.S. 512, 529 (1982).

(2) The 1972-73 Legislative History

The initial legislative history of section 504 strongly supports a construction which prohibits practices with a discriminatory effect. By 1973 both this Court and EEOC had already construed Title

VII to apply to practices with a discriminatory effect. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Seven federal agencies had issued regulations under Title VI establishing a similar effect standard.[5] Congress had expressly rejected proposals to overturn those Title VI regulations,[6] with opponents arguing that limiting the statute to instances of discriminatory intent "would gut Title VI."[7] Had Congress intended section 504 to be narrowly limited to cases of discriminatory intent, a limitation radically unlike the standard then prevailing in federal civil rights laws, someone surely would have said so, and the members of the House who had

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5 29 Fed. Reg. 16274-16305 (1964).

6 See Guardian Association v. Civil Service Commission, 77 L.Ed.2d 866, 893-94 (1983) (Marshall, J. dissenting).

7 112 Cong. Rec. 18705 (1966) (Rep. Kastenmeier).

opposed such a limitation on Title VI would presumably have voiced a similar objection.

Section 504, on the contrary, was described in expansive terms. Senator Cranston, the acting chairman of the subcommittee that drafted section 504,[8] insisted that section 504 dealt "comprehensively" with the problem of discrimination.[9] Senator Randolph, the Senate manager of the bill, explained that section 504 "prohibits any kind of discrimination against handicapped individuals with respect to any program receiving Federal financial assistance".[10]

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[8] 118 Cong. Rec. 30680 (1972) (Sen. Randolph).

[9] 119 Cong. Rec. 5862 (1973).

[10] 118 Cong. Rec. 30681 (1972). (Emphasis added). The 1974 Senate Report characterized section 504 as establishing "a broad government policy" against discrimination in programs receiving federal assistance. S. Rep. No. 93-1297, 93d Cong., 2d Sess., 38 (1974).

Discussions earlier in the session regarding the problems of the disabled had demonstrated a desire to deal with practices with discriminatory effects. Senator Humphrey, speaking in favor of including the handicapped among the groups protected by Title VI, cited a variety of practices with such effects as falling within the scope of the Title VI language copied into section 504 only a few months later. Among the instances of "discrimination" which Humphrey believed would have been forbideen by such an extension of Title VI were "transportation and architectual barriers", "the discriminatory effect of job qualification ... procedures" and the denial of "special educational assistance" for handicapped children. [11] Senator Williams, the chairman of the Labor and Public Welfare

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[11] 118 Cong. Rec. 525-26 (1972).

Committee which reported out section 504, in a Senate speech only a few months prior to that report also used the term "discrimination" to refer to practices with a discriminatory effect. The handicapped, he asserted, were the victims of "[d]iscrimination in access to public transportation" and "[d]iscrimination because they do not have the simplest forms of special services they need...."[12] Representative Vanik complained that "State governments discriminate by their apathy."[13] Congress recognized, as have the lower courts in applying section 504,[14] that the discrim-

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12 118 Cong. Rec. 3320 (1972); see also id. at 4819 (Sen. Randolph quoting Sen. Williams.)

13 118 Cong. Rec. 2998-99 (1972).

14 See Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1385 (10th Cir. 1981); NAACP v. Wilmington Medical Center, 491 F. Supp. 290, 317 (D. Del. 1980). There are few reported cases of intentional discriamination against the handicapped. The courts of appeals have generally applied an effects standard in section 504

ination to which the handicapped are subjected is ordinarily the result, not of malice, but of indifference and thoughtlessness.

The obstacles which architectural barriers posed to participation in federally assisted programs, referred to by Senator Humphrey in the passage quoted above, were a recurring concern in the debates on the Vocational Rehabilitation Act of which section 504 was a part, and were repeatedly described in terms of their effects. The 1973 Senate Report noted that such barriers "limit a handicapped indi-

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cases. Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); NAACP v. Wilmington Medical Center, 657 F.2d 1322 (3d Cir. 1981)(en banc); Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981); Jones v. Illinois Dept. of Rehabilitation Services, 689 F.2d 724 (7th Cir. 1982); Pushkin v. Regents of University of Colorado, supra; Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983).

vidual's ability to function in society."[15] Senator Randolph explained, "Those things that a person without handicaps take[s] for granted--stairs, escalators, narrow doorways--are often insurmountable obstacles to thousands of handicapped individuals."[16] Senators Cranston and Stafford pointed out that such barriers impeded access not only to jobs, but also to the very treatment centers which were supposed to provide services to the disabled.[17] Such barriers certainly had the effect of excluding the disabled from the

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[15] S. Rep. No. 93-318, 93d Cong., 1st Sess., 4 (1973). The 1974 Senate report listed architectural barriers among the forms of discrimination forbidden by section 504. S. Rep. 1297, 93rd Cong. 2d Sess. 50 (1974)

[16] 119 Cong. Rec. 5886 (1973).

[17] 119 Cong. Rec. 5882 (Sen. Cranston), 5893 (Sen. Stafford). See also id at 5898 (Sen. Williams); 117 Cong. Rec. 10311 (1971) (Sen. Dole).

jobs and services available at federally assisted programs, but equally clearly those barriers were the result of indifference, not malice. If, as seems apparent, Congress intended that all such programs were to be accessible to the disabled, that result could only have been achieved if section 504 itself forbad practices with a discriminatory effect.[18]

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[18] Congress hoped to deal with these problems in part through better enforcement of the Architectural Barriers Act of 1968. 82 Stat. 718; 42 U.S.C. §§ 4151, et. seq. But the Architectural Barriers Act covered only buildings constructed or leased with federal funds, and among these applied solely to buildings constructed after the date on which administrative standards of accessibility had been established. Thus, as Representative Vanik emphasized "only the most recently constructed public buildings" were required by law to be accessible to the disabled. 118 Cong. Rec. 2999 (1972). The vast majority of the treatment centers and other federally assisted programs in 1973 were necessarily in buildings which were not subject to the provisions of the Architectural Barriers Act.

Congress's particular concern with the employment problems of the disabled compels a similar conclusion. This Court noted in Consolidated Rail Corporation v. Darrone that "enhancing employment of the handicapped was . . . the focus of the 1973 legislation." 79 L.Ed.2d 568, 575 (1984). Senators Cranston, Williams and Taft[19] noted that the purposes of the multi-billion dollar federal vocational rehabilitation programs were directly defeated by employment discrimination against disabled workers. Congress was anxious to expand employment opportunities for the disabled, not merely out of compassion, but also because such employment would enable the handicapped to become self-supporting individuals and would thus reduce dependence on government assistance programs.

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[19] 119 Cong. Rec. 5882 (Sen. Cranston) 5882 (Sen. Williams), 24587 (Sen. Taft).

Congress realized that in the long term it was considerably less costly to provide a handicapped individual with a job, even if some accommodations were required, than to provide that individual with a lifetime of services and aid at government expense.[20]

Both the federal vocational rehabilitation programs and the repeatedly expressed congressional desire to enable disabled individuals to become productive taxpayers were as frustrated by employment practices with a discriminatory effect as by deliberate employment discrimination. Congress certainly knew, in light of the EEOC regulations and this Court's decision in Griggs, that the employment discrimination forbidden by Title VII included practices with a discriminatory effect. In

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20 118 Cong. Rec. 30680 (Sen. Randolph), 32283 (committee report), 32302 (Sen. Randolph); 119 Cong. Rec. 5886 (Sen. Randolph), 5887 (Sen. Javits), 5893.

the context of employment discrimination against the disabled, a similarly broad construction of section 504 was clearly necessary to achieve the expressed congressional purposes.[21]

Finally, section 504 was intended to assure that federally assisted programs provided services that were reasonably adapted to the need of the handicapped. Senator Cranston argued:

> [T]hose millions of handicapped individuals who pay taxes . . . have the right to expect that their tax money will go toward making . . . their lives and employment easier . . . . For those individuals who have handicapped children, the expenditure of dollars for programs which meet their needs and the needs of

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[21] See also 118 Cong. Rec. 32310 (1972) (Sen. Humphrey) (section 504 will "carry through the intent of ... bills ... introduced ... earlier this year ... to amend ... Title VII ... to make discrimination in employment because of these handicaps, and in the absence of a bona fide occupational qualification, an unlawful employment practice.")

> their children is a simple return on the equity from their taxes which has long since been warranted. 119 Cong. Rec. 5882-83 (1973).

The injustice of which Senator Cranston complained did not concern the motives of program administrators; it was simply unfair, for whatever reason, that disabled individuals who had paid taxes should be offered in return only programs that, while entirely sufficient for others, were inadequate to meet the needs of the handicapped.

Similar concerns regarding government supported programs which adequately served only individuals without disabilities were repeatedly voiced on the floor of both Houses during the debates proceeding the framing of section 504. Senator Williams emphasized that handicapped children needed special assistance if they were to enjoy an equal opportunity to learn, noting that "60

percent of all handicapped children are denied the special services they need to have an equal chance to live freely in this Nation." 118 Cong. Rec. 3320-22 (1972). Senator Dole emphasized that merely providing disabled children with the identical education designed for non-disabled children was often ineffective and unfair.[22] Senator Williams complained that government officials often placed the lowest priority on the problems of the disabled in deciding which programs to fund:

> [S]pecial services and education for the handicapped are the first programs to be done away with during times of economic adversity. The mere fact that services for those who are handicapped are considered frills of government budgets that are cut in times of economic

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22 117 Cong. Rec. 10312 (1971); see also 117 Cong. Rec. 45974 (Rep. Vanik); 118 Cong. Rec. 525 (Sen. Humphrey).

> adversity underlies a tragedy of our society. 118 Cong. Rec. 3320-22 (1972).

The injustices of which Senators Cranston, Dole and Williams spoke concerned, not the motives of the relevant officials, but the failure for whatever reason to provide the disabled with effective services.

A construction of section 504 which limited it to cases of intentional discrimination would lead to a number of incongruous results. If the tables in a school lunch room were so arranged that a student in a wheelchair could not reach the counter at which federally assisted lunches were served, school authorities would have no legal obligation to rearrange the furniture. State officials would be equally free to require applicants for welfare or public housing to personally fill out forms by hand, thus effectively excluding all

blind individuals. Interpreted in this manner section 504 would fall far short of the "comprehensive" solution to the problems of the disabled which its framers clearly intended.

Petitioners, however, suggest that the purpose of section 504, like that of Title VI, was merely to apply to federal grantees the constitutional protections regarding discrimination against the disabled which would be applicable to a government operated program. (Pet. Br. 16). But the debates leading to the enactment of section 504 are very different from those preceeding the adoption of Title VI. The legislative history of section 504, unlike that of Title VI, contains no references to any recognized constitutional standard. The fact that no member of Congress suggested in 1973 that section 504 would extend "the existing rights" of the handicapped to

discrimination by federal grantees is hardly surprising. In 1973 there were no such clearly established constitutional rights. This Court had not then, and has not to this day, decided when handicapped individuals are protected by the constitution from exclusion, intentionally or otherwise, from government programs.

In 1973 Congress could not have known whether any such constitutional protections would subsequently be held to exist. Indeed, petitioners in this Court insist that under the constitution the disabled should enjoy <u>less</u> protection than blacks or hispanics. (Pet. Br. 18 n. 21). Whether in petitioners' view even intentional discrimination against the handicapped would violate the Fifth and Fourteenth Amendments may be an open question. It is difficult to believe that legislation enacted by Congress in 1973 to "deal [] comprehen-

sively with problems such as discrimination in . . . federal grants"[23] was intended merely to extend to federal grantees the substance of future constitutional decisions which would not be issued for years and whose substance no one could then have forseen.

Petitioners argue in the alternative that, since the language of section 504 was patterned after that of Title VI, section 504 incorporates not the constitutional standard applicable to discrimination against the disabled, but the intent standard established by Title VI. But in 1973, some 5 years prior to this Court's decision in Bakke, Congress could only have concluded that Title VI embodied an effect standard. That was the manner in which Title VI had been authoritatively construed

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[23] 119 Cong. Rec. 5862 (1973) (Sen. Cranston.)

since 1964 by the agencies responsible for its implementation,[24] a construction which in 1973 stood unchallenged. This Court may ultimately have interpreted Title VI otherwise in Bakke and Guardians, but "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was." Brown v. GSA, 425 U.S. 820, 828 (1976).

Finally, petitioners suggest that because of the diversity of handicaps which exist among the disabled, Congress cannot have intended that section 504 prohibit practices with a discriminatory effect. But the application of the effect rule under Title VII is not based on any assumption that all blacks or women are affected in the same manner by employment tests or

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[24] 29 Fed. Reg. 16274-16305 (1964).

standards. There are important differences among minorities and women just as there are among the handicapped. A non-job related written examination which screens out a disproportionate number of blacks, for example, might leave more vacancies for college educated blacks able to pass that test. See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Title VII is nonetheless applicable to such a case, because "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." Connecticut v. Teal, 457 U.S. 440, 455 (1982). There is no reason to believe that Congress, when it enacted section 504, intended to endorse federally subsidized

practices which discriminated against the blind so long as the practices did not also discriminate against the deaf.

(3) The Agency Regulations and Subsequent Legislative History

The Department of Health, Education and Welfare, the agency originally responsible for coordinating enforcement of section 504, has from the outset interpreted that section to apply to practices with a discriminatory effect.[25] At least 23 other agencies have promulgated similar regulations applying a disparate impact test.[26] The Department of Justice, which is now responsible for coordinating agency

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[25] See 41 Fed. Reg. 20296 (1976) (proposed department regulations), 29560 (1976) (proposed agency regulations); 42 Fed. Reg. 22676 (1977) (final agency regulations); 45 C.F.R. § 84.4(b)(4).

[26] See U.S. Brief, pp.1-2 n.2.

implementation of section 504, requires all federal agencies to promulgate such disparate impact regulations.[27]

The prohibition against practices which have an adverse effect on the disabled is the linchpin of the regulations first issued by HEW in 1976, and now enforced by the Department of Health and Human Services. Section 84.4(b) of the regulations describes four different types of discriminatory effects which are forbidden, including methods of administration which have the effect of substantially impairing for the handicapped the achievement of the

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[27] 28 C.F.R. §§ 41.51(b)(1)(ii), 41.51 (b)(1)(iii), 41.51(b)(3), 41.51(b)(4), 41.54, 41.56.

purposes of a program.[28] Section 84.13 forbids the use of employment tests or selection criteria which have the effect of screening out handicapped persons. Subchapter C of the regulations, 45 C.F.R. §§ 84.21-22, is devoted entirely to assuring that disabled individuals are not excluded from programs because they are physically "inaccessible to or unusable by handicapped persons." Section 84.33(b) requires that the education afforded handicapped students must meet their needs "as adequately as the needs of nonhandicapped persons are met." The criteria for admission to federally assisted college programs may not have a "disproportionate adverse effect on

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[28] 45 C.F.R. § 84.4(b)(4). See also 45 C.F.R. §§ 84.4(b)(1)(ii) (unequal opportunity to participate), 84.4(b)(1)(iii) (services not "as effective as" those provided to the nonhandicapped), 84.4 (b)(5)(locating facility at a site which has the effect of excluding handicapped persons.)

handicapped persons" unless, inter alia, those criteria are in fact validated predictors of success in the education program in question. 45 C.F.R. § 84.-42(b)(2). Academic requirements which "have the effect of discriminating, on the basis of handicap" must be similarly justified. 45 C.F.R. § 84.44(a). The health, welfare and other social services provided to the handicapped must be "as effective as" the services provided to nonhandicapped individuals. 45 C.F.R. § 84.52(a)(3). Wholesale judicial nullification of these effect rules would as a practical matter destroy most of the regulatory scheme established by HEW in 1976.

This Court recognized in Consolidated Rail Corporation v. Darrone that these HEW regulations "particularly merit deference" because "the responsible congressional committees participated in their formu-

lation, and both these committees and Congress itself endorsed the regulations in their final form." 79 L.Ed.2d at 577.[29] HEW first proposed those regulations in May 1976 only after consulting with the relevant committees of both the House and Senate.[30] Senate hearings in that year expressly considered the scope and effectiveness of the oproposals.[31] InJanuary

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29 In Southeastern Community College v. Davis, 442 U.S. 397, 404 n.4 (1979), this Court suggested that HEW chose to rely on the language of section 504 alone until ordered to issue regulations in Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976). In fact, however, the May 1976 proposed regulations were first issued two months before the July, 1976 decision in Cherry.

30 Hearings on Rehabilitation of the Handicapped Programs, 1976, before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., 1491, 1503-04 (1976)(hereinafter cited as "1976 Senate Hearings".)

31 1976 Senate Hearings 323 (Rep. Dodd), 1502 (Sen. Williams), 1511 (Sen. Williams).

1977, first HEW Secretary Mathews[32] and then HEW Secretary Califano[33] provided each member of Congress with copies of the proposed regulations and solicited their comments. Following the final promulgation of those regulations, a House subcommittee conducted further hearings on the implementation of section 504 at which the Director of HEW's Office of Civil Rights expressly called attention to the various HEW regulations concerning discriminatory effects.[34]

In the spring of 1977, when the proposed section 504 regulations were awaiting final action, members of both the House and Senate repeatedly took the floor

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[32] Hearings on Review of Programs for the Handicapped 1976, before the Subcommittee on the Handicapped of the Senate Committee on Human Resources, 95th Cong., 1st Sess. 73 (1977).

[33] Id. at 76.

[34] Id. at 295-6.

to urge HEW to approve them as written. Representative Koch urged Secretary Califano to sign the regulations "in their current form". 123 Cong. Rec. 10455. Congressman Dodd expressed concern about possible changes in the proposed regulations, insisting "these regulations must not be weakened." Id. at 10823. Senator Cranston called for the "prompt and effective implementation" of the regulations, and wrote to Secretary Califano urging that the draft "be considered presumptively valid" and expressing opposition to any changes that might weaken it. Id. at 12410. Particular support was expressed for the protection the regulations would afford against architectural and related barriers,[35] a protection which

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[35] 123 Cong. Rec. 10455 (Rep. Koch), 10823 (Rep. Dodd), 12216 (Sen. Humphrey), 12410 (Sen. Cranston).

existed solely because the regulations applied to practices with discriminatory effects. The final promulgation of those regulations was greeted with virtually unanimous praise in both houses of Congress, including, significantly, from three of the members primarily responsible for framing section 504 itself, Senators Cranston, Randolph, and Williams.[36]

In 1978 Congress adopted a number of amendments to the Vocational Rehabilitation Act which reflected its approval of the HEW regulations. Section 505(a)(2) was added to make available under section 504 the rights, remedies and procedures of Title VI. The Senate Report explained that this provision was "designed to enhance the

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[36] 123 Cong. Rec. 12760 (1977) (Sen. Randolph), 13342 (Sen. Cranston), 13515 (Sen. Humphrey), 13635 (Rep. Brodhead), 14133 (Rep. Koch), 14552 (Sen. Haskell); 124 Cong. Rec. 30318 (1978)(Sen. Williams.)

ability of handicapped individuals to assure compliance with ... [section 504] and the regulations promulgated thereunder." S. Rep. No. 95-890, 95th Cong., 2d Sess.,18 (1978) (Emphasis added). Congress was well aware that those regulations included an effects standard. Thus, "in adopting section 505(a)(2) in the amendments of 1978, Congress incorporated the substance of the Department's regulations into the statute." Consolidated Rail Corporation v. Darrone,79 L.Ed.2d 568, 577 n.15 (1984).

Congress also enacted several amendments in 1978 which specifically confirmed its knowledge and approval of the effect regulations promulgated the previous year. Section 115(a)(2)provided federal funds for technical personnel "such as interpreters for the deaf ... as may be necessary... in complying with ... the requirements of

section [504] of this Title." 29 U.S.C. § 775(a)(2) (Emphasis added). Section 114(3) authorized grants to train interpreters for the deaf, the Senate Report explaining that this provision was enacted "in response to the requirements imposed by section 504". S. Rep. No.95-890, 95th Cong., 2d Sess. 41 (1978). The debates concerning these provisions reiterated their common assumption that section 504 forbad federally assisted programs from operating in a manner that had a discriminatory effect on the blind or deaf.[37] Section 118(a)(5) of the bill directed the Architectural and Transportation Compliance Board to develop standards and provide technical assistance with regard to the section 504 regulations concerning architectural, transportation and communication barriers. 29 U.S.C. §

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[37] 124 Cong. Rec. 13900 (1978) (Rep. Jeffords), 30580 (Sen. Hatch).

792(d)(3). This proposal necessarily assumed that section 504 applied to physical barriers which had a discriminatory effect on the disabled.[38] Such "subsequent legislation declaring the intent of an earlier statute is entitled to significant weight" NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1975).

In decided contrast to these efforts to facilitate enforcement of the HEW regulations regarding practices with discriminatory effects, Congress elsewhere in the 1978 Amendments expressly rejected other HEW regulations construing section

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[38] S. Rep. No. 95-890, 95th Cong., 2d Sess., 17 (creation of "a barrier free environment" one of the "goals of section 504) (referring to "methods short of physical alteration ... to achieve program accessibility under section 504 regulations.")(1978); 124 Rec. 13901 (Rep. Jeffords)(referring to the "physical barrier provisions of 504"), 30326 (Sen. Dole) ("most barriers are erected not because of intentional thought but simply because of a lack of thought").

504. Congress amended section 504 to include executive agencies and the Postal Service, 29 U.S.C. §794, overruling HEW's position that section 504 did not apply to the federal government itself.[39] Congress partially rejected HEW's views regarding the extent of protection afforded by section 504 to drug addicts and alcoholism.[40] Under these circumstances the failure of Congress to revise or repeal HEW's regulations interpreting section 504 to cover practices with discriminatory effects, indeed the absence of the slightest criticism of that construction, "is persuasive evidence that the interpretation is the one intended by Congress." NLRB v. Bell Aerospace Co., 416 U.S. 267, 275

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[39] 124 Cong. Rec. 13901 (1978).

[40] Compare 29 U.S.C. § 706(7)(b) with 45 C.F.R., Pt. 84, App. A ¶4. See also 124 Cong. Rec. 30322 (1978) (Sen. Cannon).

(1975). "Where 'an agency's statutory construction has been "fully brought to the attention of the public and Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'" North Haven Board of Education v. Bell, 456 U.S. 512, 535 (1982).

II. THE AGENCY REGULATIONS PROHIBITING PRACTICES WITH A DISCRIMINATORY EFFECT ARE REASONABLY RELATED TO SECTION 504, EVEN IF THE STATUTE ITSELF APPLIES ONLY TO CASES OF DISCRIMINATORY PURPOSE

The authority of a federal agency charged with the responsibility of administering a statute extends to the promulgation of regulations which are reasonably related to the purpose of the statute, even if the statute by itself does not contain the same requirements found in the

regulations. In Guardians Association v. Civil Service Commission, 77 L.Ed.2d 868 (1983), a majority of this Court held that the Title VI regulations establishing an effect standard were valid, despite the fact that Title VI by itself applied only to cases of discriminatory purpose. 77 L.Ed.2d at 875 and n.13 (White, J.), 894 n.15 (Marshall, J., dissenting), 708-9 (Stevens, J., dissenting). Thus even if this Court were to conclude that section 504, like Title VI, prohibits only actions with a discriminatory purpose, the majority view in Guardians makes clear that the applicable HHS effect regulations would still be valid.

This Court has repeatedly held that the authority of an administering agency extends in appropriate cases to prohibiting or requiring conduct which is not forbidden or required by the statute pursuant to

which the regulations were issued. In Mourning v. Family Publications Service, 411 U.S. 356 (1973), the respondent challenged a regulation issued by the Federal Reserve Board which required the disclosure of certain credit terms in any consumer transaction involving more than four instalments, regardless of whether or not a finance charge was imposed. The Truth in Lending Act under which the regulation was issued required such disclosures only if a finance charge was in fact being collected. This Court upheld the regulation as reasonably justified as a method of assuring compliance with the statute in cases in which a finance charge might have been built into the purchase price of the goods. 411 U.S. at 369-371. In Gemsco, Inc. v. Walling, 324 U.S. 244 (1938), the regulation in controversy forbade employers from allowing or requiring industrial

homework. The underlying statute, the Fair Labor Standards Act, did not even refer to industrial homework. The regulation was nonetheless upheld as reasonably framed to prevent evasion of the statutory minimum wage by means of piecework rates that yielded wages below that minimum. 324 U.S. at 255.

The rationale of Mourning and Gemsco is clearly applicable to statutes concerning discrimination. In both of those cases the responsible agency reasonably concluded that it was not administratively feasible to investigate and decide in each invididual instance whether there was a covert violation of the law, and that effective enforcement of the statute thus required the promulgation of a somewhat broader but considerably more administrable rule. In the case of discrimination against the handicapped it is often not

only impracticable but meaningless to attempt to distinguish between discriminatory purpose and discriminatory effect. A federally assisted recreation program which had a policy of excluding deaf children would clearly be covered by section 504. But a requirement that all applicants pass some test which required an ability to hear, although indistinguishable in operation from an express prohibition against the deaf, would not on its face constitute intentional discrimination. Deliberate discrimination when it occurs against the disabled is ordinarily based, not on any malice toward handicapped individuals, but on a good faith but inaccurate understanding of what abilities are in fact necessary to participate in a program. That misunderstanding may manifest itself in a rule expressly directed at the disabled, or simply in a rule establishing

unnecessary or arbitrary prerequisites to participation. A regulation which attempted to distinguish between these two types of practices, forbidding the former while permitting the latter, would change only the form but not substance of the practices which section 504, even on petitioners' view, was adopted to eliminate.

III. TENNESSEE'S 14 DAY RULE HAD A DISCRIMINATORY EFFECT ON THE HANDICAPPED

The practical issue presented by this case is not whether section 504 requires Tennessee to maintain any particular level of Medicaid expenditures.[41] Every one of the

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[41] Whether the Medicaid Act itself may require a state to maintain a particular level of services is not at issue in this case. This Court expressly reserved decision on that issue in Beal v. Doe, 432 U.S. 438, 444 (1977). The United States argued that the Act contained such a requirement in its brief in Williams v. Zbaraz, 448 U.S. 358 (1980).

fifty-three jurisdictions which participates in the Medicaid program faces financial problems similar to those in Tennessee, but the overwhelming majority have utilized cost control methods different from that complained of in this case. According to a federal study of Medicaid programs, which was introduced at trial, fifteen states control such costs without placing any direct limitation on inpatient hospital services.[42] Thirteen other states, together with the District of Columbia and Virgin Islands, require prior authorization for some or all hospitalization, a process which permits consideration of the actual medical needs of each patient.[43] A growing number of states achieve the same result by

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[42] J.A. 159-66.

[43] Id.

establishing a pre-determined amount that will be paid for each treatment based on the patient's diagnosis.[44] Five states limit the number of days of hospitalization per admission, a practice which expert testimony in this case indicated is both simple to administer and devoid of any adverse impact on the handicapped.[45] Four other states restrict the number of days per spell of illness.[46] Only 9 states restrict the number of days of hospitalization per year; of these Tennessee's rule was in 1980

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[44] There were four such states as of August, 1984, Utah, Pennsylvania, Ohio and New Jersey.

[45] J.A. 60-61, 101-02, 106-07, 115-16, 120-21, 126, 129, 159-66. This per stay limitation is easier to administer than Tennessee's 14 day rule, since it does not require the state or a hospital to review a patient's medical history over the current fiscal year merely to determine his or her eligibility for hospitalization coverage.

[46] J.A. 159-66.

the most drastic in the nation.[47] As of that year the states other than Tennessee which funded only a fixed number of hospital days a year set an average ceiling of 37.6 days; Tennessee's 14 day rule was less than half that average.

The defendants are free to reduce Tennessee's Medicaid costs by means of any of the methods utilized in other states,[48] which bear equally on the handicapped and nonhandicapped alike, while satisfying the Medicaid Act's requirement that reimbursement policies "assure that individuals

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[47] A private study of state Medicaid programs referred to by the United States contains essentially similar information, although it indicates the Tennessee rule is now only the second most severe in the nation. (U.S. Br. 10a).

[48] A number of other methods, in addition to those described in the text, are used outside Tennessee to control hospital costs. J.A. 161 (Puerto Rico), 163 (Michigan, Nevada), 164 (Guam), 166 (Washington).

eligible for medical assistance have reasonable access ... to inpatient hospital services of adequate quality." 42 U.S.C. § 1396a(a)(13). Indeed, the Tennessee legislature[49] has recommended that the state adopt a diagnosis related reimbursement plan, an approach already applied in several state Medicaid systems and utilized by the federal government under Medicare.[50] Respondents ask not that Tennessee apply to

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49 The Medicaid System of the Tennessee Department of Public Health, A Report of the Special Joint Committee to the Ninety-Third General Assembly, 24, 26 (1983). The Committee criticized the method by which state officials had reduced inpatient expenditures, noting that the cutback "has forced an unfair burden for cost containment efforts upon a small number of [public and non-profit] hospitals [which treat a high volume of Medicaid patients] and the counties which support these hospitals." Adoption of a diagnosis related reimbursement system was recommended as a means of reducing the burden on the hospitals "while assuring that Medicaid clients and the public are guaranteed a source for acute care." See n.44, supra.

50 42 U.S.C. § 1395ww.

the handicapped a different rule than that applicable to the nonhandicapped, such as a 20 day ceiling rather than 14 days,[51] but that the state adopt a single rule for all which is neutral not only on its face but also in its impact.

This case thus presents no issues regarding the financial costs which may in other instances be involved in complying with the mandate of section 504. Petitioners did not assert in the court below, and do not claim in this Court, that the non-discriminatory methods utilized in other states to reduce Medicaid costs would be in any way less efficacious in Tennessee. (See Pet. App. A20 n.12) This is not a case like Davis v. Southeastern Community College, 442 U.S. 397 (1979), in

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51 Indeed, the Medicaid statute itself precludes such special treatment. 42 U.S.C. (Supp. V) § 1396a(a)(10) (B).

which the federal grantee adduced persuasive evidence that altering its program to accommodate the needs of certain disabled individuals would not be feasible. Here the Tennessee officials who testified at trial never suggested that the Medicaid limitations under challenge were in any way preferable to the less burdensome alternatives.[52] There was no claim that the selection of the 14-day rule was based on any analysis of the medical needs of Medicaid patients, of the most efficacious method of administering the program, or of any other consideration. Indeed, Tennessee officials apparently preferred to lower Medicaid costs by reducing the reimbursement paid to inefficient hospitals,[53] a

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[52] J.A. 40, 68-69, 96; Transcript of August 15, 1980, pp. 99-105.

[53] Excess bed capacity, which petitioners had proposed to penalize, was one of the major reasons for the high cost of hospitalization in Tennessee. In 1980 only 70.9% of the State's licensed hospital beds

solution which would clearly have had no adverse impact on the handicapped, but that plan was abandoned at the last minute in part because of opposition by the hospital industry. (Pet. App. A14; J.A. 46-47).

In short, petitioners have consistently undertaken to defend this action, not on the ground that there was an important reason for selecting the 14 day rule as the method of limiting the state Medicaid program, but by insisting that Tennessee is free to adopt that or any other rule for no reason at all. Petitioners have offered no justification for their choice of this particular alternative, and simply insist

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were occupied. Final Report of the Special Committee on Hospital Cost Containment, 91st Tennessee General Assembly (1980). The Tennessee State Health Plan, 1970-84 noted that such excess capacity had been found to "contribute to the high cost of hospital care with little or no health benefits.

that they are under no legal obligation to do so. (See Pet. Br. 24). Petitioners expressly concede that they can offer no explanation of why even the original 20 day rule was established. (Id., 7 n.10).[54] They contend, not that the reasons for selecting the 14 day limitation should be given

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[54] Whether the 20 day rule itself had a disparate effect on the handicapped is not clear from the present record. To acertain the effect of that rule it would be necessary to know how many handicapped and nonhandicapped patients require 21 days or more of hospatilization in a year. The record contains no such information.

If the 20 day rule did have such a disparate impact, that effect would under the sixth circuit decision constitute a prima facie case of a violation of section 504. Its ultimate legality would depend in part on the nature and importance of whatever justification might exist for the 20 day rule. The state conceded at trial it would not even explain why the 20 day rule was adopted. (J.A. 45, 67).

controlling legal importance, but that the lack of any such articulated reasons is legally irrelevant.[55]

The sixth circuit, noting the extremely narrow grounds on which the 14-day rule has until now been defended, directed that the district court afford the state another opportunity to adduce a justification for that practice. Under the decision of the court of appeals, proof of the existence of a practice with an adverse effect on the

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55 Even prior to the present controversy, Tennessee has opposed to scrutiny of whether its Medicaid program was being operated in violation of section 504. The state pledged, in order to receive federal Medicaid funds, that it would periodically review its program to ensure that it did not discriminate against the handicapped, but in fact never undertook any such internal audits or evaluations. (J.A. 42, 96-97, 135, 136). All administrative complaints alleging discrimination against the handicapped have been disposed of in such a way as to make them inaccessible to federal auditors, in violation of re presentations made by the state in order to obtain federal Medicaid funds. (J.A. 42, 144 ¶ 9).

disabled is to be treated as establishing only a prima facie case of unlawful discrimination under section 504. See Connecticut v. Teal, 457 U.S. 440,447 (1982). The appellate court articulated certain standards to be applied on remand in determining whether that prima facie case had in this case been rebutted. (Pet. App. A12-A16). Neither party sought certiorari regarding this aspect of the sixth circuit opinion, and the correctness of the particular standards established by that opinion is not before this Court. Thus an affirmance by this Court of the sixth circuit's finding of an unlawful discriminatory effect would not be conclusive of this litigation, but will merely shift to petitioners the burden of establishing on remand a legally sufficient

justification for selecting the 14-day rule as the method of limiting the state's Medicaid program.

Since this case was decided by the district court in June, 1981, there have been significant changes in the Tennessee Medicaid program. First, Tennessee has restored 20 days per year of inpatient hospital coverage to individuals under the age of 21 who are receiving early periodic screening, diagnosis, and treatment services.[56] Second, Tennessee has redefined the eligibility requirements for Medicaid so as to exclude entirely from that program a substantial number of individuals who were covered by Medicaid in 1980.[57] As a

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[56] See U.S. Br. 8a. Federal law expressly allows greater inpatient care to be given to such children. 42 U.S.C. §§ 1396a(a)(10)(I), 1396d(a); 42 C.F.R. § 441.57.

[57] This change was accomplished by excluding from the Medicaid program most individuals classified as "medically needy." See Schweicker v. Gray Panthers, 453 U.S. 34, 37-38 (1981). Copies of the

result of these changes in the 14-day rule as it existed at the time of trial, some of the handicapped patients adversely affected by the 14-day rule are now entitled to 20 days of hospitalization per year, and some of the nonhandicapped patients who were not affected by the 14-day rule now no longer receive any hospitalization at all under Medicaid.

Whether under the eligibility rules now in operation the adverse impact of the 1980 rule has been aggravated, mitigated, eliminated, or altered in some other legally relevant manner the record does not disclose and we do not know. Since this is an action for injunctive relief, respondents' right to any remedy depends on the substance and effects of the 1984

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453 U.S. 34, 37-38 (1981). Copies of the state rules altering the eligibility of such medically needy patients have been lodged with the Clerk.

rules, not of the rather different rules which were in effect in 1980. Under these circumstances the appropriate disposition of this case would appear to be to remand it for an evidentiary hearing to ascertain what effect the 1984 rules now have on handicapped Medicaid patients. See Spomer v. Littleton, 414 U.S. 514 (1974). On the assumption, however, that the Court may wish to resolve the issues that were presented by the 1980 rules, we set forth our views on those questions.

(1) The Nature of Tennessee's 1980 Medicaid Restrictions

The 14 day rule in effect in 1980 had a peculiarly selective effect. Of approximately 51,000 annual Medicaid patients, 44,000, those who needed less than 15 days of hospitalization in a year, were entirely exempt from any reduction in Medicaid

services. All of the cost savings were made by reducing the services provided to the comparatively small group of patients, less than 15% of the total, who required 15 days or more of medical treatment in the same fiscal year. The 7,000 indigent Medicaid recipients picked to bear all of the burden of the reduction in services were chosen, not because their medical needs were less serious, or because they were somehow abusing the Medicaid system, but merely because they had the ill fortune to be too sick, or to be sick too often, in a particular fiscal year. Over 63% of those adversely affected by the 14 day rule were handicapped, while 72% of the group unaffected by the rule were nonhandicapped.

The harsh impact of the 14 day rule was felt when a Medicaid patient, having used up his or her allotted two weeks of coverage, again required hospitalization

for treatment of an injury or illness in the same fiscal year.[58] The undisputed evidence at trial demonstrated that it was frequently impossible in Tennessee for a sick or injured indigent individual to obtain admission to a hospital once his or her annual Medicaid coverage was exhausted.[59] Even some critically ill patients could not obtain hospital care.[60] One doctor, for example, described his experience trying to save the life of the victim of a car accident who, although literally bleeding to death, had been turned away at a series of Tennessee hospitals. (J.A.

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[58] If a patient exhausts his or her 14 days while still undergoing treatment, Tennessee hospitals will nonetheless not discharge the patient without the physician's approval. J.A. 53-54, 106, 116, 129.

[59] J.A. 50-52, 100-02, 116, 121-23.

[60] J.A. 125-26, 129; transcript of hearing of February 17, 1981, pp. 5-7.

124). At best indigent patients faced a substantial likelihood that, once their allotted days were exhausted, they would be denied hospitalization until their condition had deteriorated sufficiently to become life threatening. (J.A. 48-58).

This system had a number of anomalous aspects. For the first few weeks in July, the beginning of the fiscal year, all Medicaid eligibles were able to obtain admission to Tennessee hospitals. As the fiscal year progressed, and allotments were used up, an increasing number of those Medicaid patients were denied both Medicaid coverage and admission to hospitals in the state. By June some 7,000 Medicaid patients faced rejection if they needed and sought hospitalization. For these patients the 14 day rule compelled postponement of treatment for medical problems which arise late in the fiscal year; a patient whose

illness needs 2 days of hospitalization in May must generally wait until July, even though by then his or her condition may have deteriorated so much as to require a week or more of treatment.

The ceiling has nothing to do with a patient's total Medicaid costs. A patient who has already received $10,000 in outpatient treatment, tests and medication still is entitled to 14 days of hospitalization, while a patient whose previous 14 days of hospitalization and other treatment cost only $5,000 cannot hospitalization. If two Medicaid patients sustain identical injuries in an automobile accident, one may receive needed hospitalization, while the other is denied it solely because of treatment earlier in the year for some entirely unrelated condition. A patient hospitalized from June 2 to July 2 continues to receive hospitalization coverage;

an otherwise identical patient hospitalized from June 15 to July 15 would thereafter be denied hospitalization for eleven and a half months.

(2) The 1980 Rules Had A Discriminatory Effect Within the Scope of Section 504

Neither the peculiarities of the manner in which this rule operated, nor the fact that it deprived only about 7,000 of the 51,000 Medicaid patients of benefits, were by themselves of importance under section 504. So long as the burdens of these or any other restrictions do not fall more heavily on the handicapped, section 504 has no application. But in this case the method of selecting the 7,000 patients whose benefits were to be reduced did not fall equally on the disabled and non-dis-

abled alike. As of 1979-80 the number of patients affected by the rule was as follows:

	Handicapped	Non handicapped
Total patients	16,852	34,288
Patients Hospitalized 14 days or less	12,235	31,626
Patients Hospitalized 15 days or more[61]	4,617	2,662

[61] Pet. App. 31-32; J.A. 170-72, 182-84.

These statistics, prepared by the defendants, treat as "handicapped" individuals who are blind or disabled within the meaning of the Social Security Act. (42 U.S.C. § 1382(a)(A)). The group of handicapped individuals covered by section 504 is somewhat broader. See 29 U.S.C. § 706(7)(B). The method used by Tennessee to calculate the effect of the 14 day rule is similar to the methodology that is utilized by the Office of Civil Rights of the Department of Health and Human Service to ascertain the impact of the 14 day rule. (J.A. 148, 155-56). Both courts below accepted these statistics as accurately reflected the effect of the 14 day rule on Medicaid patients who were handicapped within the meaning of section 504. The court of appeals noted the state's methodology tended to understate the adverse effect of the 14 day rule. (Pet. App. A11.)

Handicapped patients were 33.0% of those receiving hospital care, but 63.4% of the patients selected to bear the burden of the Medicaid cuts.[62] Under the 14-day rule, 92.2% of the non-handicapped patients were provided all the hospital care they needed,

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Both parties to this litigation stipulated that the defendant's statistics accurately depicted the impact of that rule on individuals protected by section 504. (J.A. 40; see also J.A. 94, 156).

The Solicitor General, apparently disagreeing with the methodology of the Department of Health and Human Services, urges that this case be remanded with instructions to reopen this issue. (U.S. Br. 7 n.13). But the Solicitor General, like this Court, is obligated to accept the concurrent factual findings of the two courts below and the binding stipulation entered into by actual parties.

[62] The court of appeals noted that while these statistics were analyzed in several different ways by both parties, all the analyses demonstrated that the 14 day rule would have a disproportionate adverse impact on the handicapped. (Pet. App. A11).

but only 71.6%[63] of all handicapped patients received similarly complete coverage. Thus 27.4% of handicapped patients faced the prospect of being denied admission to a Tennessee hospital because they had exhausted their allotted Medicaid days, compared to only 7.8% of non-handicapped patients. Medical experts explained at trial that many of the illnesses which

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[63] The state asserts that 95% of all "eligible handicapped individuals" would have all of their "inpatient hospitalization needs" met despite the 14 day rule., (P. Br. 10, 21). This calculation severely understates the effect of the 14 day rule by including in the group not harmed by that rule 73,816 handicapped individuals who are eligible for hospitalization but who are not never sick enough to require any hospitalization. (See Pet. App. A31-A32). Obviously the effect of a reduction in hospitalization must be assessed by considering only its impact on hospital users; Medicaid eligibles who do not actually use Medicaid hospitalization have no "inpatient hospital needs" to meet. See Hazelwood School District v. United States, 433 U.S. 299, 308 (1979).

leave victim partially or totally disabled often require repeated, sometimes lengthy, hospitalization during the year. Among those chronic and disabling diseases are strokes, leukemia, sickle-sell anemia, degenerative neurological diseases such as multiple sclerosis, and obstructive lung diseases such as asthma and bronchitis. (J.A. 100, 108-10, 111-13, 118-20.). The state candidly acknowledged in its appellate brief that "the handicapped population of Medicaid recipients would suffer proportionately more from the reduction in hospital benefits than the nonhandicapped Medicaid recipients." (Pet. App. A11 n.7.) The issue presented by this appeal is whether the state's practices, which concededly "fall more harshly on one group than another", Connecticut v. Teal, 457 U.S. 440, 447 (1983), have the type of discriminatory effect which is covered by

section 504 and the applicable regulations.

The 14 day rule is inconsistent with several aspects of section 504 and the applicable regulations. First, under the 14 day rule approximately 7,000 otherwise eligible Medicaid patients, two-thirds of them disabled, are literally denied needed Medical hospitalization services.[64] The 4,000 disabled patients involved are denied access to those services for differing periods of time, depending on whether they use up their annual allotment early or late in the fiscal year. At least at some point during the fiscal year, however, each of

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64 This case is clearly distinguishable from Doe v. Coulotti, 592 F.2d 704 (3rd Cir. 1979). In Doe the state did not cover private psychiatric inpatient case under its Medicaid program to the same extent that it covered inpatient hospital treatment for physical illness. Since such psychiatric case was not subject to any reimbursement from the federal government, the third circuit properly held section 504 inapplicable.

these 4,000 handicapped Medicaid patients becomes sick enough to require hospitalization but cannot obtain it.

If Tennessee adopted a rule which barred for 12 months of the year the same predominantly handicapped group of patients, the violation of section 504 would be obvious. These individuals are undeniably "otherwise qualified" in the sense that they have the same medical needs, require the same treatment, and are indigent to the same degree as those who are provided with Medicaid hospitalization. If they were denied such services on a year round basis, they would clearly be "excluded from the participation in ... [a] program or activity receiving federal financial assistance."

Section 504 is no less applicable merely because under the 14 day rule the affected handicapped patients are only

denied hospital services during part of the year. Nothing in the language of the statute limits its application to exclusions which endure throughout an entire calendar or fiscal year. An exclusion for any period of time falls within the literal scope of section 504. If Tennessee in June of each year removed for one month the ramps providing wheelchair access to federally assisted programs in the state, no one would seriously suggest that the previous 11 months of access somehow were sufficient to comply with the law. Congress never intended to give a federal grantee a license to discriminate against the handicapped at one point in time merely because he had earlier treated them favorably. See Connecticut v. Teal, 457 U.S. 440, 455 (1982).

Tennessee insists that the patients denied hospitalization are not technically excluded from the program. But meaningful participation in Medicaid consists of being treated when sick or injured, not in the empty privilege of possessing an unusuable Medicaid card and reminiscing about past visits to the hospital. The period of exclusion under the 14 day rule lasted less than a year, but if its effect does not constitute exclusion from a federally assisted program, the state would be free to establish a far longer period of exclusion. Patients who used 14 days of hospitalization within a given period could be excluded from the program for 5 or 10 years, or for life. Nothing in the language of section 504 or the applicable regulations countenances treating such exclusions as if they were a form of participation. Whether or not a Medicaid

patient is "excluded" from Tennessee's program on a particular day turns on whether or not he or she actually receives needed hospitalization, not on the reasons which may have prompted the state to deny that treatment.

The Solicitor General relies on a commentary to the HHS regulations which explains that a burn treatment center "need not provide other types of medical treatment to handicapped persons unless it provides such medical services to non-handicapped persons." 45 C.F.R. Pt. 84, App. A, ¶ 33. The evident purpose of that commentary is merely to make clear that the states are authorized to establish specialized hospitals, and that a recipient's obligation to take resonable steps to accommodate the disabled does not require it to treat deafness at an eye hospital. The instant case, however, involves no

specialized facilities. The problem is not that Tennessee hospitals are ill equipped or unable to treat the medical problems of the handicapped, but that the state is unwilling to pay for that care. In Tennessee not even a burn treatment center will admit a disabled burn victim if he or she has already exhausted his or her allotted 14 day of care.

Even if the handicapped individuals adversely affected by the 14 day rule are not regarded as being excluded from Medicaid during a portion of the year, it is nonetheless indisputable that they receive a very different type of medical care than most patients. The overwhelming majority of all nonhandicapped patients remain eligible for hospitalization whenever they need it throughout the year; thousands of other handicapped patients, on the other hand, must wait to actually

receive needed services until the next fiscal year. In some instances such delays in receiving medical care can be literally fatal. Delay will often result on a serious deterioration in a patient's condition, ultimately leading to more radical or dangerous forms of treatment. Paraplegics, for example, are particularly susceptible to decubitus ulcers, more commonly known as bedsores; treated promptly this is ordinarily a relatively minor illness, but left untreated it can lead to amputation of the limb involved. Even where such severe consequences are not involved, a postponement of hospitalization will often mean that the patient must endure weeks or months of pain or disability until the coming of the new fiscal year brings with it the overdue hospitalization.

The dangers and suffering which are occasioned by the delays compelled by the 14 day rule fall far more heavily on handicapped patients. More than 1 in 4 handicapped Medicaid patients are subject to such delays in Tennessee, compared to less than 1 in 13 nonhandicapped patients. This type of disparate impact falls within the scope of several of the applicable regulations of the Department of Health and Human Services. First, section 84.4(b)(4) provides:

> A recipient may not ... utilize criterion or methods of administration ... that have the ... effect of defeating or substantially impairing accomplishment of the objectives of recipient's program with respect to handicapped persons....

Second, section 84.4(b)(1)(iii) forbids a recipient from providing "a qualified person with an aid, benefit or service that

is not as effective as that provided to others...." See also 45 C.F.R. § 84. 52(a)(3).

The application of these regulations to the facts of this case is clear. A method of administration which delays the medically necessary hospitalization of 4,000 handicapped patients each year undeniably "substantially impair[s]" for them the accomplishment of the manifest goals of the Medicaid program. Tennessee law expressly states that the objective of the state Medicaid program is "to prevent, diagnose, correct and cure conditions that cause acute suffering, endanger life, result in illness or infirmity, interfere with [a patient's] capacity for normal activity, or threaten some significant handicap ...." T.C.A. § 14-23-103(2).[65] The

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[65] The Solicitor General appears to argue with regard to this regulation that the phrase "objectives of the recipient's program" in section 84.4(b)(4) refers not

objectives of a recipient's program must in any event include furthering the purposes of the federal program under which it is funded, and healing the sick is certainly the goal which led Congress to enact the Medicaid Act in 1964. See 42 U.S.C. § 1396. The achievement of these federal and state objectives is interferred with severely,

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to the goal of that program, but merely to the act of providing the service intended to achieve that goal. On that reading the "objective" of Tennessee's program would be, not to cure the sick, but merely to provide 14 days of hospitalization, regardless of whether that period of hospitalization was sufficient, or perhaps, even necessary. That is, the "objective" of providing 14 days of hospitalization, the government appears to suggest, is to provide 14 days of hospitalization. This is, at the least, an extremely peculiar construction of the term "objective", a term which usually refers to the ultimate goal of an activity, not to the manner in which that activity occurs.

and in some instances possibly fatally, by postponing needed hospitalizaton for thousands of handicapped patients.

It is equally apparent that the selective imposition of those delays on a predominantly handicapped group of patients provides them with a type of medical care which is decidedly less effective than that afforded to almost all non-handicapped patients. 45 C.F.R. § 84.4(b)(1)(iii). Delayed treatment will often be less efficacious treatment, and even the most skilled care cannot undo the suffering that will have occurred because needed care was postponed, not for any medical reason, but merely to await the arrival of the next fiscal year. Where medical needs are concerned, treatment delayed is invariably treatment denied.

(3) The "Same Service" Defense

Petitioners and the Solicitor General, while acknowledging the undeniable adverse impact of the 14 day rule, insist that that impact is as a matter of law irrelevant. Both argue that section 504 of the HHS regulations are fully satisfied whenever the handicapped receive from a federally assisted program the "same service" that is provided to nonhandicapped individuals. Petitioners assert that thelaw "require[s] only that aids, benefits and services, be provided in like kind to both the handicapped and nonhandicapped." (Pet. Br. 23) The United States suggests "A person who offers the same goods and services ... to all ... is treating all ... equally ... is not discriminating against any of them." (U.S. Br. 22). Tennessee's practices cannot be accurately characterized as providing equal access to hospitalization.

By June of each fiscal year Tennessee is not offering the same services to every qualified patient; some 4,000 handicapped patients are not offered hospitalization at all.

Petitioners' view of section 504 and the HHS regulations has been repeatedly rejected both by the United States and by this Court. Section 84.4(b)(1)(iv) notes that under certain circumstances:

> provid[ing] different ... aids, benefits, or services ... is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.

See also 45 C.F.R. § 84.5(a)(5). The official HHS commentary to the regulations notes that "in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of

nonhandicapped are met, adjustments to regular programs or the provisions of different programs may be necessary." 45 C.F.R. Pt. 84 App. A ¶ 6. The explanation of the HEW regulations issued in May 1977, when the final regulations were promulgated, emphasized

> [I]n the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity.... 42 Fed. Reg. 22676 (1977).

HEW Secretary Mathews, in a commentary published with the first draft of these regulations, noted "Handicapped persons may require different treatment in order to be afforded equal access to federally assisted

programs and activities, and identical treatment may, in fact, constitute discrimination." 41 Fed. Reg. 20296 (1976).

This Court rejected the same argument now advanced by Tennessee in Lau v. Nichols, 414 U.S. 563, 568. (1977) In Lau the federally assisted public school classes and materials were ordinarily in English. The city conducted special English language instruction classes for many but not all of the students who entered the school system speaking only Chinese. 414 U.S. at 564 and n. 1. The Chinese speaking students unable to obtain admission to those classes asserted that these practices violated the Title VI regulations. The court of appeals had held that these students were entitled only to "the same facilities, text books, teachers and curriculum as is provided to other children...." 483 F.2d 791, 799 (9th Cir. 1973). The city pressed here an

argument indistinguishable from that now advanced by Tennessee, insisting that it had "not erected physical barriers at the school house doors."[66] This Court reversed the decision of the court of appeals, relying in particular on section 80.3(b)(2) of the HEW Title VI regulations, a provision which, in language virtually identical to section 84.4(b)(4) of the section 504 regulations, forbad federal grantees from utilizing methods of administration which had "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular ... national origin."[67] The Court emphasized "there is

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66 Brief of Respondents, 5, 20.

67 See also Memorandum for the United States, pp. 10-11.

is no equality of treatment merely by providing ... the same facilities, textbooks, teachers, and curriculum ... for students who do not understand English". 414 U.S. at 566, 568.[68]

Petitioners point to no provision of the section 504 regulations which purports to immunize from scrutiny practices which have the effect of excluding handicapped individuals from a program merely because

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68 The United States argues that a federal recipient would be insulated from Section 504 scrutiny if it provided all program participants with a voucher of equal dollar amount to purchase goods and services. (U.S. Amicus Brief at 13, 22-23, 25). That hypothetical example is of little relevance here, since Title XIX so clearly precludes such a policy. This Court has expressly held that the obligation to treat individuals equally is at times violated by providing identical amounts of money which in fact purchase unequal services. Arizona Governing Board of Norris, 77 L.Ed.2d 1236 (1983). The school board in Lau could not have satisfied the mandate of this Court by providing students with a voucher sufficient in amount only to pay for English language instruction.

that exclusion is based on the receipt of past services. Neither do they suggest that the language of the methods of administration regulation applied in Lau requires automatic approval of any program providing the same service to all. Petitioners argument, like that of the Solicitor General, is limited to a contention that such a per se defense is somehow to be found in the equal effectiveness regulations, 45 C.F.R. §§ 84.4(b)(1)(iii), 84.52(a)(3).

The literal language of sections 84.4(b)(1)(iii) and 84.52(a)(3), however, expressly contemplates an inquiry into the actual effectiveness of the services provided to the handicapped. But Tennessee and the Solicitor General suggest that the plain meaning of these regulations is limited by 45 C.F.R. § 84.4(b)(2), which provides:

> For the purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

Petitioners contend that this provision "dramatically qualifie[s]" sections 84. .4(b)(1)(iii) and 84.52(a)(3), and requires only that services "be provided in like kind to both handicapped and nonhandicapped." (Pet. Br. 23) This construction of section 84.4(b)(2) simply flies in the face of the language of that section, which squarely holds that services of a "like kind" are insufficient if they afford unlike opportunites for achievement or satisfaction to handicapped and nonhandicapped participants.

The Solicitor General offers a more sophisticated misreading of section 84.4(b)(2), insisting that that section requires only that "the handicapped must be given an 'equal opportunity'" to get the same service "(whatever that may be) that the State offers to others." (U.S. Br. 14). This unlikely construction of section 84.4(b)(2) ignores that provision's insistence that handicapped participants be afforded an equal opportunity to "obtain the same result" and reach "the same level of achievement" as others. If a Medicaid program is structured in such a way that in June of each year nonhandicapped patients can obtain hospital treatment, but handicapped patients cannot, the handicapped patients clearly do not have the same opportunity as the others to obtain the cure which results from such treatment.

The government's faulty analysis derives in large measure from a misreading of the term "benefit" in section 84.4-(b)(2), an error which pervades the the Solicitor's brief. The noun "benefit" has two distinct meanings, it can refer either to a valuable good or service ("fringe benefit"), or to the advantage or gain derived from that good or service ("for the benefit of mankind"). Which meaning of "benefit" is intended is ordinarily apparent from the context in which the word is used. That term is used in both senses in section 84.4(b)(2), which explains that "benefits ... to be equally effective ... must afford handicapped persons equal opportunity to obtain the same ... benefit." Here the first "benefit" refers to the particular type of assistance provided, and the second "benefit" to the advantages derived from that assistance. That is

apparent from the overall structure of the sentence; the regulation simply makes no sense if it provides, as the Solicitor suggests, that a particular service is "equally effective" if it provides an equal opportunity to obtain itself. The doctrine of in pari materia supports a similar conclusion; "benefit" first appears in a list which includes aids and services, but its second use is in a list including result and level of achievement.

The error in the Solicitor's interpretation of the phrase "same benefit" is signaled by the fact that while section 84.4(b)(2) asserts that the handicapped must "gain" the same benefit, the government's brief paraphrases the regulation as requiring that the participant "get" the same benefit. (U.S. Br. 15) The verb "gain" is used with "benefit" only where "benefit" refers to the advantage or value

which accrues to someone; a participant "gets" a service and "gains" an advantage from that service.

In this case , of course, respondents actually seek only the same service at the end of a fiscal year that is available to nonhandicapped patients. But in other contexts the "same service" defense would lead to a number of anomalous results. Were this defense recognized, a recipient might be obligated to take steps to remove physical barriers which prevent a handicapped individual from entering the room in which a federally assisted activity occurred, but would be under absolutely no obligation to make those services useful to that individual once he or she entered. Thus a federally assisted summer camp attended by paraplegic children would be obligated by section 504 to provide a ramp at the entrance to its recreation building,

but could limit the activities in that building to hopscotch, skipping rope, tap dancing and roller skating. A practice which resulted in a 10% difference in the proportion of handicapped and nonhandicapped individuals admitted to a federally assisted program would be suspect, but a practice which caused a 100% difference in the effectiveness of that program would be immune from scrutiny. Section 504 would be violated if some practice prevented the participation of the disabled in a minor part of a program, but not if the entire program failed to meet or address their needs.

The Solicitor General also attacks the decision of the court of appeals[69] as

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[69] Central to the Solicitor General's attack on the Court of Appeals' holding is its characterization of that holding as a requirement "that the handicapped be assured of the same success rate as the non-handicappedinachieving[goodhealth]". In fact, the appellate court was doing nothing more than enforcing the quite

involving "affirmative action", a requirement which the government urges was disapproved by Southeastern Community College v. Davis, 442 U.S. 397 (1979). (U.S. Br. 21, 23, 26) Under Southeastern Community College, he suggests, a federal grantee is never obligated to spend any additional funds, or take any other form of positive action, merely because of the particular needs of disabled individuals

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different requirement of the Department of Health and Human Services that the handicapped "be given an equal opportunity to succeed at the goal of the [Medicaid] program." (Pet. App. A12, n.8, citing 45 C.F.R. 84.4(b)(2).) It would obviously be impossible, simply as a function of the limits of medical science and the reality of human frailty, to order that any group of patients be assured of a particular "success rate" in achieving good health. Whatever the inherent limits on the benefits that a handicapped patient may derive from inpatient treatment, he is deprived the opportunity to obtain any benefit at all, if, as occurs under Tennessee's policy, he cannot even gain admission to the hospital.

who wish to participate in its program. Thus in the government's view it is irrelevant whether, for example, the state actually incurs no saving, or even wastes money, by requiring a handicapped individual who becomes ill in May to postpone his or her hospitalization until the July; the mere act of treating that patient in a timely fashion is itself "affirmative action." On the interpretation advanced by the Solicitator General the congressional policy mandated by section 504 would be merely one of benign neglect.

Southeastern Community College requires no such extreme result. That decision expressly recognized that there were "instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped." 442 U.S. at 413. The claims of the plaintiff in that case were rejected

because she was not an "otherwise qualified" applicant for admission to the school at issue, and could not, even if admitted, "receive even a rough equivalent of the training a nursing program normally gives."442 U.S. 410. Southeastern Community College did not address the issues presented by a case such as this in which the qualifications of the handicapped plaintiffs are not in question.

A construction of section 504 that exempted federal grantees from any duty to take positive measures to make their programs accessible to and effective for the handicapped would clearly be unfaithful to its legislative history. Positive measures are essential to addressing the concerns expressed by Congress in 1973 regarding physical barriers.

> In the context of public transportation and the handicapped, denial of access

> cannot be lessened simply by eliminating discriminatory selection criteria; because the barriers to equal participation are physical rather than abstract, some sort of action must be taken to remove them, if only in the area of new construction or purchasing. "It is not enough to open the door for the handicapped ...; a ramp must be built so the door can be reached." Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982).

The legislative debates leading to the adoption of section 504 make clear that Congress believed that under certain circumstances the absence of special services or accommodations for the handicapped would constitute discrimination. (See pp. 25-27 supra)

The use of the phrase "affirmative action" in Southeastern Community College has given rise to a certain amount of confusion in the lower courts. Congress used that phrase in sections 501 and 503,

but not in 504, because "affirmative action" is a term of art whose use has traditionally been limited to employment statutes, referring to such personnel measures as recruiting and promoting members of a protected group. The phrase was first utilized in this manner in section 202(1) of Executive Order 11246, issued in 1965. The phrase "affirmative action" is now used in 22 federal statutes[70] to impose positive duties with regard to non-discrimination; in each of these instances the statute involved is concerned with employment practices. Where Congress intended to impose positive duties of other

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70 5 U.S.C. §§ 2302(d), 4313, 4703, 7201(e); 22 U.S.C. § 3905(e); 29 U.S.C. §§721(a), 791(b), 791(d), 793(a), 796(h), 1755, 1781(a), 1781(b), 1781(c); 31 U.S.C. § 732; 38 U.S.C. §§ 2012(a), 2014(c); 42 U.S.C. §§ 2000e-17, 6005; 45 U.S.C. §§ 797b(a), 907, 1004. The phrase is also utilized to describe the obligations imposed on a party guilty of violating the law.

kinds, it has not used the phrase affirmative action. That phrase is not utilized, for example, to describe the special education services required by the Education for the Handicapped Act. 20 U.S.C. §§ 1411 et seq. Similarly, the duty of an employer under Title VII to accommodate the religious needs of an employee is not couched in terms of affirmative action, but is assumed to be encompassed within the duty of non-discrimination. 42 U.S.C. § 2000e(j). Although the respondents in this case seek no remedy which might under any plausible definition be characterized as affirmative action, some clarification of the language in Southeastern Community College may be called for to avoid the confusion which now exists regarding the scope of section 504.

The Solicitor General suggests that HHS has concluded that the 14 day rule at issue in this case does not violate the section 504 regulations. The government's brief states at p. 20:

> Here the district court found that the state plan would fully serve 95% of even handicapped Medicaid eligibles ... For that reason the Health Care Financing Administration has approved Tennessee's 14-day limit. (Emphasis added).

Later, noting that determining whether the regulations have been violated is a responsibility of HHS, the Solicitor asserts, "As we have already made clear, the concerned agency has found no such problem here." (U.S. Br. 29 n.37). The clear implication of these passages is that HHS has held that the 14 day rule is consistent with section 504. The truth is otherwise.

The submission made by Tennessee to HCFA sought and obtained only a decision that the 14 day rule did not violate the Medicaid Act. The submission contained no information whatever regarding the effect of that rule on the disabled. Although exclusive responsibility for resolving section 504 issues is vested in the HHS Office of Civil Rights, no submission was ever made to OCR, and only HCFA officials gave approval to the change. HCFA officials signified their approval merely by signing a form submitted by Tennessee; that approval contains no reference to section 504, to the section 504 regulations, or to any of the facts of this case. Counsel for respondents did file an administrative complaint seeking a decision from the HHS Office of Civil Rights as to whether the 14 day rule violated section 504 and the applicable regulations. That complaint

was filed in August, 1980. (See J.A. 146) To this day, some four years later, OCR has failed to issue a decision resolving that complaint.

CONCLUSION

Since the plaintiffs in this case have carried their initial burden of establishing that Tennessee's method of administration has a disparate adverse effect on the handicapped, the state must justify its choice by demonstrating that the particular budget reduction method selected for limiting Medicaid benefits has a "manifest relationship" to a legitimate interest. Connecticut v. Teal, 457 U.S. 440, 447 (1982); Pet. App. A16. If, as seems unlikely on the present record, the state has such a justification, the admitted adverse impact of its actions at least

compels it to demonstrate that justification. City of Los Angeles Department of Water v. Manhart, 435 U.S. 702, 717 n.31 (1978).

To demand such justification is to do no more than to compel the state to honor the commitments which it has made over the years as a condition of receipt of more than a billion dollars in federal Medicaid funds. Having freely acknowledged the adverse disparate impact of their actions upon the handicapped, and their failure to consider such effects, the defendants must now do what Section 504 has always compelled them to do: they must consider whether their "method of administration of the [inpatient hospital service] .. [has] the ... effect of defeating or substantially impairing accomplishment of the objectives of that program with respect to handicapped persons." 45 C.F.R. § 84

.4(b)(4). Since, as the defendants themselves have always known, the particular method of administration which they chose has such an effect, consideration necessarily must be given to the availability of alternative methods which would be devoid of such discriminatory consequences.

The petitioners' objections to the court of appeals' decision amount in the final analysis to an assertion that the methods by which they administer hundreds of millions of federal Medicaid dollars each year are simply immune from scrutiny under section 504. This is so, argues the state, regardless of the extent to which handicapped patients are forced, in the petitioners' own words, to "suffer proportionally more" under the particular methods of administration selected by the state. In the instant case, the decision whether

or how to cut inpatient coverage was, to the petitioners, purely a mechanical process, involving only a simple mathematical calculation, and no more. (J.A. 68, 96). The petitioners not only admit, they vigorously insist that consideration of the effects of those calculations upon the health and safety of thousands of handicapped patients was entirely extraneous to their administration of the program.

The state's adamant indifference to the plight of the handicapped finds support in neither the legislative history of section 504 nor the regulations implementing that statute. If section 504 is not read, as the sixth circuit read it, to at least require consideration of the needs of the handicapped, congressional intent to deal "comprehensively" with discrimintion against the handicapped in federally

assisted programs will have been frustrated. It is difficult to imagine how section 504 could require any less in these circumstances and still have any practical meaning.

For the above reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

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